Enco Systems Sdn Bhd v Soon Hin Hardware Sdn Bhd

HIGH COURT (IPOH) — CIVIL APPEAL NO 12–42 OF 2008
VT SINGHAM J
14 OCTOBER 2008

Civil Procedure — Summary judgment — Appeal — Triable issues — Whether sessions court judge erred in law or facts in granting summary judgment — Whether triable issue raised

The plaintiff/respondent ('plaintiff') and defendant/appellant ('defendant') companies had entered into a contract for the sale of goods. The plaintiff, on its part had sold and delivered goods to the defendant as per the delivery orders and invoices. The defendant in turn was granted credit facilities to pay for the price of the goods sold and delivered before the expiry of 60 days. The delivery orders and invoices contained endorsements that interest at the rate of 1.5% per month would be charged on overdue accounts, ie accounts outstanding for more than 60 days. The defendant made payments after the 60 day grace period for some of the goods sold and delivered to it. The plaintiff claimed interest as agreed for the late payment of the goods sold and delivered. The defendant by way of its letters and faxes requested that it be granted more time to make the interest payments. The plaintiff then served a notice of demand on the defendant for the interest on the overdue accounts amounting to RM88,101.39. Upon receipt of the notice of demand the defendant replied that it had never agreed to pay the interest charges to the plaintiff. The plaintiff therefore proceeded to file the writ of summons with the statement of claim for the sum of RM88,101.39 in the sessions court. The defendant in turn filed its defence wherein it claimed that it did not agree to pay the interest as claimed by the plaintiff. The plaintiff thereupon applied for and obtained summary judgment against the defendant. This was the defendant's appeal against the decision granting the plaintiff summary judgment. The defendant contended that the sessions court judge had erred in law or on the facts in granting the summary judgment.

Held dismissing the appeal with costs:

(1) The defendant in the instant case had not denied the claim for interest payment at the first available opportunity, that is, when the delivery orders and invoices were received by it. On the contrary it had asked for

time to consider the claim for interest payment and for reduction on the interest payment. The only time the defendant chose to dispute the claim for interest was when it received the notice of demand from the plaintiff. The plaintiff, on the other hand, had right from the beginning of the business transaction informed the defendant of its intention to impose interest after the 60 days grace period if payment was not received for the goods sold and delivered. This was a clear case where summary judgment ought to be given because the documentary evidence before the court did not disclose any triable issue or issues which were required to be tried in open court. As such the sessions court judge had not erred in granting the summary judgment (see paras 13–14 & 16).

(2) The only material relied on by the defendant was a credit application form, which was in effect an application form for credit facilities that included a proposal by the defendant not to be liable for interest and as such not a contract defined by law. In any case there was no evidence tendered by the defendant that the plaintiff had accepted the proposal or that the defendant had demanded for return of the said application form duly signed by the plaintiff. It was not enough for the defendant to raise an issue or any issue but an arguable issue. Based on the totality of the evidence produced by both parties it was clear that the issue raised by the defendant was not a triable issue but merely an issue raised as an afterthought to delay the plaintiff's claim for summary judgment. Therefore it was inexpedient to allow the defendant to defend for the mere purpose of delay (see paras 15, 19, 22 & 23).

[Bahasa Malaysia summary

Plaintif/responden ('plaintif') dan defendan/perayu ('defendan') syarikat-syarikat menandatangani kontrak jualan barangan. Plaintif telah menjual dan menghantar barangan kepada defendan seperti dalam pesanan penghantaran dan invois-invois. Sebagai balasan, defendan diberikan kemudahan kredit untuk membayar harga barangan yang telah dijual dan dihantar sebelum tamat tempoh 60 hari. Pesanan penghantaran dan invois-invois tercatat catiteraan bahawa faedah pada kadar 1.5% sebulan akan dikenakan pada akaun-akaun yang lewat bayar, iaitu, akaun-akaun yang belum dijelaskan lebih dari 60 hari. Defendan membuat bayaran selepas tempoh 60 hari tersebut bagi sebahagian barangan yang telah dijual dan dihantar kepadanya. Plaintif menuntut faedah seperti yang dipersetujui bagi bayaran lewat atas barangan yang telah dijual dan dihantar. Menerusi surat menyurat dan faks-faks defendan meminta diberikan lebih masa untuk membayar faedah tersebut. Plaintif kemudiannya menyerahkan notis tuntutan kepada defendan untuk faedah atas jumlah yang lewat dibayar sebanyak RM88,101.39. Apabila menerima notis tuntutan tersebut defendan

membalas bahawa ia tidak pernah bersetuju untuk membayar faedah kepada plaintif. Plaintif kemudiannya terus memfailkan writ saman dengan penyata tuntutan untuk jumlah RM88,101.39 di mahkamah sesyen. Defendan kemudiannya memfailkan pembelaannya yang mana ia mendakwa bahawa ia tidak pernah bersetuju membayar faedah seperti yang dinyatakan oleh plaintif. Plaintif memohon dan mendapat penghakiman terus terhadap defendan. Ini merupakan rayuan defendan terhadap keputusan membenarkan penghakiman terus bagi pihak plaintif. Defendan menghujah bahawa hakim mahkamah sesyen telah khilaf dari segi perundangan atau fakta dalam membenarkan penghakiman terus tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Defendan dalam kes ini tidak menafikan tuntutan bayaran faedah pada peluang yang pertama, iaitu apabila pesanan penghantaran dan invois-invois diterima. Sebaliknya, ia meminta diberikan waktu untuk mempertimbangkan tuntutan bayaran faedah tersebut dan juga pengurangan bayaran faedah tersebut. Defendan hanya mempertikaikan tuntutan faedah tersebut apabila ia menerima notis tuntutan daripada plaintif. Plaintif pula, sejak dari mula urusan perniagaan telah memaklumkan defendan tentang niatnya untuk mengenakan faedah selepas tempoh 60 hari jika bayaran masih belum diterima bagi barangan yang telah dijual dan dihantar. Ini merupakan kes yang nyata di mana penghakiman terus harus diberikan oleh sebab keterangan dokumentar di hadapan mahkamah tidak menunjukkan sebarang isu-isu yang perlu dibicarakan atau isu-isu yang perlu dibicarakan di mahkamah terbuka. Oleh itu, hakim mahkamah sesyen tidak khilaf dalam membenarkan penghakiman terus (lihat perenggan 13–14 & 16).

(2) Satu-satunya material yang digunakan oleh defendan adalah borang permohonan kredit, yang mana merupakan borang permohonan untuk kemudahan kredit, termasuklah cadangan oleh defendan agar ia tidak bertanggungan atas faedah dan oleh itu bukanlah suatu kontrak dalam pentafsiran undang-undang. Dalam apa keadaan pun, tiada keterangan yang diutarakan oleh defendan yang menunjukkan plaintif menerima cadangan tersebut atau defendan mendesak borang permohonan tersebut dipulangkan dengan tandatangan plaintif. Adalah tidak mencukupi bagi defendan membangkitkan sesuatu isu atau apa-apa isu pun, tetapi ia harus membangkitkan isu yang boleh dihujahkan. Berdasarkan keseluruhan keterangan yang dikemukakan kedua-dua pihak, adalah jelas bahawa isu-isu yang dibangkitkan oleh defendan bukannya isu-isu yang boleh dibicarakan tetapi isu yang dibangkitkan selepas difikirkan kemudian semata-mata, untuk melengahkan tuntutan

penghakiman terus plaintif. Maka, adalah tidak bijak untuk membenarkan defendan membela hanya untuk tujuan melengah-lengahkan (lihat perenggan 15, 19, 22 & 23).]

Notes

For cases on appeal, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6883–7049.

Cases referred to

Alliance Bank Malaysia Bhd v Exelus Corporation (S) Sdn Bhd & 3 Ors [2002] MLJU 602; [2003] 2 AMR 502, HC (refd)
Anglo Hawaiian Bank v Wells 38 LT 201 (refd)
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ Rep 14, SC (refd)
Bank of China v Ngan Chin Wen [2005] 7 MLJ 28, HC (refd)
Banque de Paris et des Pays-Bas (Suisse) SA v Costa de Naray & Anor [1984] 1 Llyod's Rep 23, CA (folld)
Bhogal v Punjab National Bank, Basha v Punjab National Bank [1988] 2 All ER 296, CA (refd)
Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2007] 1 AMR 825, FC (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (folld)
Cow v Casey [1949] 1 KB 474, CA (refd)
Daya Anika Sdn Bhd v Kuan Ah Hock [1998] 6 MLJ 537, HC (refd)
Ellis v Wates Construction Ltd [1978] 1 Llyod's Rep 83 (refd)
Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212, PCA (refd)
European Asian Bank v Punjab & Sind Bank (No 2) [1983] 2 All ER 508 (refd)
Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia [1981] 2 MLJ 196, FC (refd)
Ho Chooi Soon v The Indian Overseas Bank Ltd [1961] MLJ 86, CA (refd)
Hong Leong Finance Bhd v Rextex Rubber Products (M) Sdn Bhd & Anor [1996] 4 CLJ 580, HC (refd)
Ionian Bank Ltd v Couvreur [1969] 1 WLR 781, CA (refd)
Ironglade etc Co v Gardner 4 TLR 18 (refd)
Jacobs v Booth Distellery Co [1901] 85 LT 262, HL (folld)
Jones v Stone [1894] AC 122, PC (refd)
KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd [1996] 1 MLJ 233; [1996] 2 CLJ 611, CA (refd)
Lee Wah Bank Ltd v Joseph Eu [1981] 1 MLJ 11, FC (refd)
Llyod's Banking Co v Ogle (1876) 1 Ex D 262 (refd)
Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183; [1987] 1 CLJ 246, SC (refd)
Ng Ah Ba & Ors v Ramanda Sdn Bhd [1996] 1 MLJ 62; [1995] 3 AMR 2949, CA (refd)

A *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 AMR 631, CA (refd)

RG Carter Ltd v Clarke [1990] 1 WLR 578, CA (folld)

Rock Records (M) Sdn Bhd v Audio One Entertainment Sdn Bhd [2005] 3 MLJ 552, HC (refd)

B *Saw v Hakim* (1888) 5 TLR 72 (refd)

Southern Finance Bhd (formerly known as United Merchant Finance Bhd) v Sun City Development Sdn Bhd & Anor [2006] 6 MLJ 673; [2006] 7 CLJ 464, HC (refd)

C *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v Ghazali bin Ibrahim* [1985] 2 MLJ 225, HC (refd)

Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin (f) [1984] 1 MLJ 160, FC (refd)

D *Syn Lee & Co Ltd v Bank of China* [1961] MLJ 87; [1960] 1 LNS 133, CA (refd)

Tansa Enterprise Sdn Bhd v Temenang Engineering Sdn Bhd [1994] 2 MLJ 353, HC (refd)

Voo Min En & Ors v Leong Chung Fatt [1982] 2 MLJ 241, FC (refd)

E *Wong Nget Thau & Anor v Tay Choo Foo* [1994] 3 MLJ 723, HC (refd)

Woon Hoe Kan & Sons Sdn Bhd v Bandar Raya Developments Bhd [1974] 1 MLJ 24, FC (refd)

Legislation referred to

F Rules of the High Court 1980 O 14
Subordinate Courts Rules 1980 O 26A(1)

Atma Singh Veriah (Atma Singh Veriah & Co) for the appellant.
KL Choy (KL Choy & Co) for the respondent.

G

VT Singham J:

H **[1]** This is an appeal against the decision of the learned sessions court judge who had on 25 March 2008 granted the respondent's application for summary judgment under O 26A(1) of the Subordinate Courts Rules 1980 ('SCR') for the sum of RM88,101.39. The respondent's claim against the appellant is for *interest payment* due at 1.5% per month as at 30 June 2006 on the late payments made after the period of 60 days of the credit facilities I granted to the appellant for goods sold and delivered to the appellant. The appellant being dissatisfied with the decision of the learned sessions court judge who had granted the summary judgment in favour of the respondent has appealed to this court. In this appeal, the appellant and the respondent will be referred to as the defendant and plaintiff respectively.

[2] This court finds that the facts which are not in dispute between the parties are as follows: A

(a) The plaintiff had sold and delivered goods to the defendant as per the delivery orders and invoices as included in the record of appeal (encl 5) and acknowledged by the plaintiff with the company stamp and signature. B

(b) Amongst the terms of the credit facilities granted to the defendant, the defendant is to pay for the price of the goods sold and delivered before the expiry of the 60 days. C

(c) Some of the payments for the goods which were settled by the defendant were after the 60 days grace period.

(d) A fax letter dated 13 December 2002 (exh KSK3) as exhibited in the affidavit in reply No 2 of the plaintiff which was sent by the defendant to the plaintiff pursuant to a telephone conversation on 5 December 2002 was received by the plaintiff. D

(e) The defendant had by another fax letter dated 8 March 2004 replied to the plaintiff's letter dated 2 March 2004 requesting to grant time and a further period of three to four months to take up the payment of interest due as at 31 December 2003 with the management for consideration. E

(f) By the said fax letter dated 8 March 2004, the defendant had requested the plaintiff only to grant them a further period of three to four months to take up the claim on interest payment to their management for consideration but the defendant had never denied that they were not liable to pay the interest. F

(g) The delivery orders and the invoices which contain the endorsements were sent by the plaintiff and received by the defendant with the endorsements during the period when the goods were delivered to the defendant which is as follows: G

(i) *On the delivery orders*, it is endorsed 'interest will be charged on overdue account at the rate of 1.5% per month'. H

(ii) *On the invoices*, it is endorsed 'interest of 1.5% per month will be charged if payment is not received within the due date without prejudice to our rights to institute legal proceedings for recovery'. I

(h) As to the notice of demand dated 14 August 2006 (exh KSK1) sent by the plaintiff's solicitors to the defendant which the defendant had received, the defendant had denied the interest payment through their solicitor's reply dated 29 August 2006 for the said sum of

RM88,101.39, being the charges due for the late payments and contended that the defendant had never agreed to pay the interest charges to the plaintiff.

(i) As the defendant had failed to pay the said sum of RM88,101.39, the plaintiff had filed the summons with the statement of claim dated 27 December 2006 at the Sessions Court Ipoh, to claim for the said sum of RM88,101.39.

(j) The defendant had filed the statement of defence dated 28 February 2007.

(k) The plaintiff had filed the application dated 10 April 2007 and supported by an affidavit affirmed on 9 April 2007 for summary judgment under O 26A(1) of the Subordinate Courts Rules 1980 against the defendant.

(l) The defendant had contested the application for the summary judgment by filing an affidavit in reply affirmed on 25 April 2007. In fact, there are three affidavits by the plaintiff and three affidavits in reply by the defendant.

(m) On 25 March 2008 judgment was given against the defendant by the learned sessions court judge pursuant to O 26A(1) of the Subordinate Courts Rules 1980 for the said sum of RM88,101.39.

(n) Notice of appeal was filed by the defendant's solicitors on 1 April 2008.

[3] At this stage it is important to be reminded that O 14 of the Rules of the High Court 1980 ('RHC') or O 26A(1) of the SCR 1980 is a summary judgment procedure and not a summary trial procedure (see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281). In O 14 applications, the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendant having a real or bona fide defence. Ian Chin J in *Wong Nget Thau & Anor v Tay Choo Foo* [1994] 3 MLJ 723 was of the view that in order to look at the 'whole situation', a judge must go through the affidavit and documentary evidence and not do so 'cursorily'. This was because it is trite law that the affidavit evidence must not be uncritically accepted. Ian Chin J in *Wong Nget Thau & Anor v Tay Choo Foo* [1994] 3 MLJ 723, said at pp 735–736:

> Therefore, the affidavit evidence would have to be examined in detail to see if 'there is a fair or reasonable probability of the defendants having a real or bona fide defence'. I am of the view that the whole of the evidence has to be looked at, even if it involves minute examination of documents and facts, if by such exercise the court can come to a conclusion that there is no fair or reasonable probability of the defendants having a real or bona fide defence. The Privy Council in *Tractors*

Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1 (PC) went through the evidence with a fine tooth comb, (that was what the Supreme Court was of the opinion of in *Raja Zainal Abidin bin Raja Hj Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16; [1993] 2 AMR 2073 (SC)). I do not see why the court cannot do that in an O 14 proceeding. The court also went through the evidence in *Banque De Paris Et Des Pays-Bas (Suisse) SA v Costa De Naray and Anor*'s case in considerable detail. I have also gone through the evidence in detail in the case of *Ribu Daya Sdn Bhd v Malsa Ideal Sdn Bhd & 2 Ors* [1994] 3 CLJ 831. Other courts appear to have already taken a similar view, like the High Court in Penang in the cases of *Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd & Ors* [1994] 1 MLJ 495; [1994] 2 CLJ 646 and *Suppuletchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368; [1994] 2 AMR 1191. Could it then, after going through the affidavits and documentary evidence and considering the circumstances, be said that there is 'a fair or reasonable probability of the defendant having a real or bona fide defence?' What the court has to do in order to arrive at that decision is stated by the Supreme Court in *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312 at pp 321–322; [1994] 1 CLJ 328 at p 335 (SC), thus:

> It need hardly be emphasised that in order for the court to arrive at a decision that the defence has merits it must perforce make a reasoned assessment of the justice of the case by forming a professional view of the probable outcome of the case, but this is stating the obvious. It involves a mental process that goes through the mind of a judge when making a decision in any case, weighing the evidence of a litigant against that of another on the facts alleged by a party against those of the other before finally coming to a decision.

[4] The underlying philosophy in the O 14 provision is to prevent a plaintiff who is clearly entitled to the money from being delayed from obtaining his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases (see *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183; [1987] 1 CLJ 246).

[5] The general rule is, where a defendant shows that he has a fair case to raise a defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to be given leave to defend (see *Saw v Hakim* (1888) 5 TLR 72; *Ironglade etc Co v Gardner* 4 TLR 18). However, this discretion lies entirely with the judge and the defendant must be able to demonstrate facts as might be deemed sufficient to entitle him to defend. In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ Rep 14, the Supreme Court said:

A Under O 14 when a fact is asserted by one party and denied by another, and such denial is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or other statement by the same deponent or is inherently improbable in itself, the judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable.

B

[6] This court is mindful of the principle governing the exercise of power under O 14 of the RHC 1980 as stated in *Jacobs v Booth Distellery Co* (1901) 85 LT 262 where Halsbury LC observed:

C People do not seem to understand that the effect of O 14 is that, upon the allegation of the one side or the other, a man is not to be permitted to defend himself in court; that his rights are not to be litigated at all. There are something too plain for argument; and when there were pleas put in simply for the purpose of delay which only added to the expense, and where it was not in aid of justice that such things should continue, O 14 was intended to put an end to that state D of things, to prevent sham defences, from defeating the right of parties by delay, and at the same time causing great loss to the plaintiffs who were endeavouring to enforce their rights.

Lord James said:

E It is not for that tribunal to enter into the merits of the case at all. It ought to make the order only when it can say to the person who opposes the order 'you have no defence'. You could not by general demurral, it were a point of law, raise a defence. We think it is impossible for you to go before any tribunal to determine the question of facts. We are not expressing any opinion whatever upon the merits of F the case.

[7] The power to enter judgment by summary procedure under O 14 of the RHC 1980 applies to straightforward and unarguable cases or where the G defence raised by the defendant has no substance or has been described as 'shadowy' (see *Llyod's Banking Co v Ogle* (1876) 1 Ex D 262; *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 and *Ionian Bank Ltd v Couvreur* [1969] 1 WLR 781). On the other hand, 'the ordinary practice is that there must be some real basis, not a shadowy basis, for H showing that there is issue worthy of investigation by the courts'. '… Each case must be decided on its own facts and with a degree of robustness, remembering what the background is' (see *Ellis v Wates Construction Ltd* [1978] 1 Llyod's Rep 83).

I **[8]** In *Rock Records (M) Sdn Bhd v Audio One Entertainment Sdn Bhd* [2005] 3 MLJ 552, His Lordship Abdul Malik Ishak J (now JCA) said:

It is now trite law that a plaintiff may obtain a judgment against the defendant on the ground that the defendant has no cause of action. The plaintiff must establish its cause of action. Once the plaintiff succeeds in making out a prima facie case,

the onus then shifts to the defendant to show to this court as to why judgment should not be entered against it. One may ask, what then constitutes a triable issue or a bona fide defence? one may also ask, how does one assess whether there are triable issues? In *Renofac Builder (M) Sdn Bhd v Chase Perdana Bhd* [2001] 5 CLJ 371 at p 379, the court there remarked:

> But a mere bare assertion by the defendant would not be sufficient. The duty of the court is quite onerous in the extreme. The court must be vigilant and must view in perspective at the whole scenario in order to ascertain whether the defendant has a real or what is commonly known as a bona fide defence.

It is obvious that what is being called for is this. That a critical evaluation of the facts presented by the parties through their pleadings and affidavits must be carried out and that mere bare assertions or denials must be rejected. In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14, the Supreme Court had this to say:

> Under O 14, when a fact is asserted by one party and denied by another, and such denial is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself the Judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable.

[9] The defendant in facing an application for summary judgment is required to raise triable defences. A triable defence is taken to mean that that it is for the defendant to show on merits, he has a good defence to the claim, or that a difficult point of law is involved, or the dispute is as to the fact which is to be tried or any other circumstances showing reasonable grounds of a bona fide defence (see *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v Ghazali bin Ibrahim* [1985] 2 MLJ 225 at p 226). Whether or not a defence is bona fide or an issue is bona fide triable depends on the facts or the law arising from each case. The court is not to delve into the merits of the issues raised by the defendant or whether the defendant are likely to succeed or fail (see *Hong Leong Finance Bhd v Rextex Rubber Products (M) Sdn Bhd & Anor* [1996] 4 CLJ 580 per Abdul Malik Ishak J (as he then was). In *European Asian Bank v Punjab & Sind Bank (No 2)* [1983] 2 All ER 508, Goff LJ said:

> … at least since *Cow v Casey* [1949] 1 KB 474, this court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under the RSC, O 14, even if the question of law is at first blush of some complexity and therefore takes 'a little longer to understand'. It may offend against the whole purpose of O 14 not to decide a case which raises a clear-cut issue, when full argument has been addressed to the court and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal: see *Verrall v Great Yarmouth Borough Council* [1981] QB 202 at pp 215, 218 per Lord Denning MR. The policy of O 14 is to prevent delay in cases where there is no defence …

> … on the evidence, there is no issue or question in dispute which ought to be tried, and that there is no other reason for which there ought to be a trial of action or any part of it. If the matter were to go to trial, all that would happen would be that exactly the same arguments, at much the same length on exactly the same evidence, would be advanced all over again before the trial judge. Having formed a clear view, as we have done, that there is no arguable defence to this claim, it would be quite wrong to allow it to go to trial, and no doubt to yet another appeal. In all the circumstances, therefore, we consider this to be a case where the Court of Appeal should not hesitate to substitute its own view for that of the judge. We therefore allow the appeal, and order that the judgment be entered for the plaintiffs against the defendants for the sum claimed.

[10] The court will not find a triable issue for the purpose of granting leave to defend on the basis of the defendant's allegation alone. There must be some evidence to support the allegation (see *Alliance Bank Malaysia Bhd v Exelus Corporation (S) Sdn Bhd* [2002] MLJU 602; [2003] 2 AMR 502 at p 505). In *RG Carter Ltd v Clarke* [1990] 1 WLR 578, Lord Donaldson MR said:

> If a judge is satisfied that there are no issue of facts between the parties, it would be pointless for him to give leave to defend on the basis that there was a triable issue of law. The only result would be that another judge would have to consider the same arguments and decide that issue one way or another. Even if the issue of law is complex and highly arguable, it is far better if he then and there decides himself, entering judgment for the plaintiff or the defendant as the case may be on the basis of his decision.

An allegation which is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, should be rejected outright. No triable issue would arise in these circumstances (see *Bank of China v Ngan Chin Wen* [2005] 7 MLJ 28).

The law is settled that it is not sufficient for the defendant to merely deny the debt but he must condescend upon any cogent facts which negative the existence of the debt or which show that the claim is not maintainable on other grounds (see *Southern Finance Bhd (formerly known as United Merchant Finance Bhd) v Sun City Development Sdn Bhd & Anor* [2006] 6 MLJ 673; [2006] 7 CLJ 464).

> The general principle is where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence he ought to be given leave to defend (*Saw v Hakim* (1888) 5 TLR 72). A defendant should not be shut out from defending unless it is very clear indeed that he has no case in the action under discussion (*Sheppards v Wilkinson* (1889) 6 TLR 13). The power to give summary judgment under O 14 is 'intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where therefore it is inexpedient to allow a defendant to defend

for mere purposes of delay' (*Jones v Stone* [1894] AC 122). Where there is any serious conflict to matters of fact or where any real difficulty as to matters of law arises, summary judgment under O 14 should not be granted (*Electric and General Corpn v Thomson-Houston Electric* 10 TLR 103). But, however difficult the point of law is, once it is understood and the court is satisfied that it is really unarguable it will give final judgment (*Cow v Casey* [1949] 1 KB 481) (see *Percetakan Solai Sdn Bhd v Kin Kwok Daily News Sdn Bhd & Anor* [1986] 1 MLJ 240 at p 245; [1985] CLJ (Rep) 632 at p 637).

In an application under O 18 r 19 or O 14 of the RHC 1980, it is still incumbent upon the court to determine whether issues could appropriately have been decided, without expense of a full trial with witnesses and expenditure of the courts' invaluable time. No party in a proceeding is entitled to require the court to accord them valuable time of several days open court viva voce trial only upon mere or bare assertions in their affidavits.

A time will come soon if not now when willy-nilly the court may have to adopt the optimum evaluation approach on summary application proceeding so as to confront the problem of baseless claims or defences head-on. It cannot be accused of doing hurried justice when public policy and administration of justice would not condone an abuse of process of the court and the court is clearly clothed with inherent jurisdiction under O 92 r 4 to prevent such abuse (per Vincent Ng J (now JCA) in *Suppuletchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368 at pp 381–383).

In *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212; Lord Diplock said at p 217:

Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he may think just the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth.

In *Lee Wah Bank Ltd v Joseph Eu* [1981] 1 MLJ 11, HRH Raja Azlan Shah CJ (as HRH then was) observed:

The remaining question therefore that arises here for our determination is whether the bank is entitled to an O 14 judgment. The principle applicable in this sort of cases has been stated very often in this court in recent years, the last case being in *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282: where all the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the assistant registrar or the judge in chambers, or, for that matter this court, shall not deal with the whole matter under the RSC O 14 procedure.

In *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196, HRH Raja Azlan Shah CJ (as HRH then was) observed:

> We now consider the application for summary judgment. It was rightly raised by counsel for the University that the case turns on the interpretation of the provisions of Act 30 of 1971 and the Constitution of the University, and therefore the court ought to be very cautious in treating it under O 14. We are disposed to agree with that argument for this reason; not that cases depending on the interpretation of a statute or statutes deserve any different treatment from that of any other case under O 14. An O 14 order in the view we have always taken of it is a very stringent procedure because it shuts the door of the court to the defendant. The jurisdiction ought only to be exercised in proper cases. If the University and University Colleges Acts and related legislation come into an O 14 case, no greater attention in principle is to be given by the court to that class of action than to any other class of action. The only point is that as everybody knows the pertinent legislation is long and complicated. But it is not sufficient under an O 14 case to flourish the title of the University and University Colleges Act, etc, in the face of the court and say that is enough to give leave to defend. If a point taken under the Acts is quite obviously an unarguable point, and the court is satisfied that it is really unarguable, the court has precisely the same duty under O 14 as it has in any other case. The court has the duty to apply the rule (see *Harry Tong Lee Hwa v Yong Kah Chin* [1981] CLJ 6).
>
> In *Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd* [1972] 1 MLJ 168; [1972] 1 LNS 31 I pointed out that in an O 14 case, where it turned on the construction of a few documents, and the court was only concerned with what, in its judgment, was the true construction, there could be no reason to go formally to trial where no further facts could emerge which would throw any light on the documents that had to be construed. We think we can safely apply that principle to the present case.

In *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282, HRH Raja Azlan Shah CJ (as HRH then was) observed:

> That brings us to the important question whether the assistant registrar was entitled to deal with the case under the RSC O 14 procedure. We have often said in this court many a time that where all the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the assistant registrar or the judge in chambers, or, for that matter this court, shall not deal with the whole matter under the RSC O 14 procedure.

In *Banque de Paris et des Pays-Bas (Suisse) SA v Costa de Naray & Anor* [1984] 1 Llyod's Rep 23, Ackner LJ said:

> It is of course trite law that O 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendant's having a real or bona fide defence.

In *Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin (f)* [1984] 1 MLJ 160, Lee Hun Hoe CJ (Borneo) said at p 163:

> Not all disputes of fact necessarily raise serious questions to be tried. It is of course quite right to say that it is undesirable to resolve disputes on affidavit evidence. Yet judges are expected in applying the test to be critical of the affidavit evidence which must on the face be at least plausible.

In *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v Ghazali bin Ibrahim* [1985] 2 MLJ 225, Mohamed Dzaiddin J (as he then was) said:

> The issue here is whether or not there is a triable defence. This simply means that it is for the defendant to show on merits, he has a good defence to the claim, or that a difficult point of law is involved, or the dispute is as to the fact which is to be tried or any other circumstances showing reasonable ground of a bona fide defence.

[11] Order 14 application is not a case of bringing the issues on affidavit evidence but is rather a question of deciding on affidavit evidence whether there is a moral improbability of a very high degree that the defendant can possibly succeed (see *Syn Lee & Co Ltd v Bank of China* [1961] MLJ 87; [1960] 1 LNS 133. In *Ho Chooi Soon v The Indian Overseas Bank Ltd* [1961] MLJ 86, Thompson CJ said:

> In this appeal we are concerned with another aspect of the question of appeals against orders made under O 14.
>
> In a case of this sort it is not a case of trying the issues on affidavit evidence, it is rather a question of deciding on affidavit evidence whether there is a moral improbability of a very high degree that the defendant can possibly succeed.
>
> On the other hand, we have to remember that the order is there as much on the interest of defendants as in the interests of plaintiffs. It is in the interest of plaintiffs that they should be able to get prompt judgment when there is no real defence. But on the other hand it is in the interest of defendants in such cases that plaintiffs should be able to get judgments not only expeditiously but economically.
>
> Though it is trite law that a conflict of evidence ought not to be disposed of on affidavit evidence only it is also trite law that the affidavit must not be uncritically accepted. The affidavit evidence would have to be examined in detail to see if there is a fair or reasonable probability of the defendant having a real or bona fide defence. The whole of the evidence has to be looked at, even if it involves minute examination of documents and facts, if by such exercise the court can come to a conclusion that there is no fair or reasonable probability of the defendant having a real or bona fide defence (see *Wong Nget Thau & Anor v Tay Choo Foo* [1994] 3 MLJ 723; [1994] 4 CLJ 617). Order 14 is intended to put an end to sham defences concocted for the sole purpose of delay and consequently causing great loss to the plaintiff who is endeavouring to enforce its right under the law (see *Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor* [1994] 3 MLJ 530; [1994] 4 CLJ 757). A

defendant's defence is not limited to the facts sworn in the affidavit (see *Perbadanan Pembangunan Ekonomi Sarawak; Syarikat Pakar Kayu v MAA-SK Sdn Bhd*).

In *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 AMR 631, His Lordship Gopal Sri Ram JCA observed that O 14 should be used only in instances where there are no authentic triable issue.

> We have not dealt in any detail with the facts and particulars of the several allegations made on both sides as it is not our province to touch on the merits of the issues involved. We only need to consider whether or not there are issues or questions in dispute which ought to be tried. Summary judgment is only given in a plain and obvious case (per HRH Raja Azlan Shah Ag LP (as HRH then was) in *United Malayan Banking Corpn Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 at p 208).
>
> In opposing an application for summary judgment, it is not sufficient for the defendant to raise facts, which do not constitute a defence to the claim, nor is a mere denial of indebtedness (see *Wallingford v Mutual Society* (1880) 5 App Cas 685 at p 709). It is not sufficient for the defendant to raise an issue or any issue; he must raise an arguable issue which would require a trial in order to determine it (see *Voo Min En & Ors v Leong Chung Fatt* [1982] 2 MLJ 241).
>
> The proceeding established by that order '(O 14)' is a peculiar proceeding, intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purpose of delay (per Lord Halsbury in *Jones v Stone* [1894] AC 122 at p 124)
>
> The purpose of O 14 of the Rules of the High Court 1980 is to enable a plaintiff to obtain summary judgment without trial if he can prove his case clearly. The respondent has satisfied all the considerations and has established a prima facie case against the appellants. We cannot see why the application for summary judgment should be refused neither can we see what can be achieved if the matter between the respondent and the appellants go for trial. For the reasons above, we dismissed this appeal with costs and ordered that the deposit be paid to the respondent towards account of taxed costs (per Mohd Ghazali Yusoff JCA in *Chong Hin Trading Co Sdn Bhd & Ors v Malayan Banking Bhd* [2004] 4 MLJ 453 at p 465; [2004] 3 CLJ 436 at p 448).

DECISION

[12] This court finds that the one and only issue raised by the defendant to contest the application for summary judgment is that, the plaintiff is not entitled to claim for the interest as the defendant did not agree to pay the interest even though it is admitted that the payment for the goods sold and delivered as stated in the delivery orders and the invoices were settled after the said 60 days grace period.

[13] Having gone through the record of appeal (encl 5) which contains the entire pleadings, the rekod rayuan tambahan (encl 9) which contains the order dated 25 March 2008 and the judgment dated 25 March 2008 and upon hearing both parties and after considering the written submissions with the authorities and upon further research carried out by this court, this court finds the learned sessions court judge had not erred in law or on the facts in granting the summary judgment as prayed by the plaintiff for the following reasons:

(a) The defendant has admitted receiving the delivery orders and the invoices from the plaintiff for the goods sold and received which contains the said endorsement.

(b) The credit application form (exh NTP 1) relied on by the defendant is not a contract as recognised by law and the undated application form itself expressly states that it is a credit application form signed by the defendant for credit facilities up to RM250,000. The credit application form contains an offer from the defendant seeking for credit facilities 'without being liable to pay interest for late payment or made after the expiry of the Credit period as stipulated in the invoices and Delivery Orders'.

(c) There is no evidence that the plaintiff had agreed to accept the defendant's offer not to pay interest at 1.5% per month on all over due debts accruing after the expiration of the 60 days grace period.

(d) The defendant themselves have admitted that the plaintiff's cause of action will only arise if payments are not settled by the 60 days grace period ie upon the expiry of the 60 days grace period. In fact, the defendant's affidavit evidence clashes with the contemporaneous documentary evidence.

(e) Therefore, it is beyond any stretch of the imagination that the plaintiff having granted and waited for 60 days for the defendant to settle the price of the goods is not entitled to any consideration for the forbearance during the period for payments made after the grace period of the 60 days for the goods sold and delivered to the defendant.

(f) The defendant having received the delivery orders and the invoices with the endorsement on a regular basis have not taken any positive steps to deny or protest or even delete the endorsement during the said period when the delivery orders and the invoices were received by the defendant.

(g) Despite the defendant sending several letters to the plaintiff, the defendant in their replies had never denied or protested that the plaintiff is not entitled to claim for interest for the late payments or that their request was ever agreed by the plaintiff as contended by the

defendant until their solicitors letter dated 29 August 2006. The defendant had several opportunities to deny or protest the claim for interest payment if in fact they had maintained that they were not liable to pay but they chose not to deny or protest.

(h) Merely relying on the credit facilities form (exh NTP 1) which is clearly an application for credit facilities and offering not to be liable for the interest payment, and without producing any consent or agreement from the plaintiff, the defendant cannot escape liability to pay interest at 1.5% per month for over due payments after the 60 days grace period as there is no evidence to support their defence. In fact, the documents, being the delivery orders and the invoices sent to the defendant subsequent to the credit application form expressly states of the payment of interest at 1.5% per month but yet there was no protest for interest payment on the overdue payment after the 60 days grace period.

(i) The only time the defendant chose to dispute the claim for the interest is through their solicitors reply dated 29 August 2006 to the 'Notice of Demand' dated 14 August 2007 from the plaintiff's solicitor.

(j) Upon considering the background facts and the conduct of the defendant, it is obvious that the denial was an afterthought as the defendant had not denied the claim for the interest payment at the first available opportunity when the delivery orders and the invoices were received by them.

(k) This court finds that the defendant does not have to wait for legal advice to deny the plaintiff's claim for interest payment as it is entirely within their knowledge whether they are bound to pay for the interest payment or not.

(l) The defendant has not produced a single letter apart from the letter dated 29 August 2006 (exh NTP3) from their solicitor that the defendant had ever denied the interest payment as claimed by the plaintiff. On the contrary, the defendant has been asking for time to consider the claim for interest payment and for reduction on the interest payment. On one hand, the defendant has contended that the request for reduction on the interest payment was made on a 'without prejudice' basis. On the other hand, they chose to extract the second paragraph of their said letter dated 26 July 2006 and have disclosed the same in para 7(c)(i) and (ii) in their affidavit in reply affirmed on 25 April 2007 which states:

(a) 'in spite of the difficult times the defendant faced, the defendant has kept its obligation and settled their accounts for every material the plaintiff delivered and accepted by the defendant';

(b) 'the defendant in view of maintaining good will as well as providing future opportunities for both parties to continue business relationship, the defendants are willing to consider 10% of the plaintiff's purported interest calculation'.

[14] This court finds there is no necessity for a trial as the issue raised by the defendant is not a triable issue and does not require assessment of credibility of witnesses to be seen or heard by the learned sessions court judge in open court. There is no real basis and the issue raised by the defendant is not worthy of any investigation by the court and there is no real basis which requires an oral examination as the issue could be determine by summary procedure based on the documentary evidence. This is a clear case where summary judgment ought to be given. The documentary evidence which is before the court does not disclose any triable issue or issues which required oral examination as even if it were to proceed to trial, it would still have to be decided purely on the documentary evidence.

[15] The only material being the credit application form (exh NTP1) relied on by the defendant is not a contract as defined by law and the court wishes to stress that it is clearly an application form for credit facilities and includes a proposal by the defendant not to be liable for interest. There is no evidence that the plaintiff have accepted the said proposal or term or that the defendant had ever followed-up with the plaintiff to request for the return of the said application form if it was such an important document which required the plaintiff to sign and return the same ie if the plaintiff had agreed to the proposal for not imposing interest. There is no such evidence that the defendant had ever demanded for the return of the said credit application form duly signed by the plaintiff until after the plaintiff had filed for this summary judgment.

[16] It is clear from the materials disclosed by the affidavits that the plaintiff had, right from the beginning of the business transaction informed the defendant of its intention to impose interest after the 60 days grace period if payment is not received for the goods sold and delivered to the defendant. On the other hand, the defendant has not produced any counter evidence to raise any triable issue which requires oral examination on the claim for the said interest payment.

[17] Since the defendant has shown themselves to be so careful and cautious to such an extent that when they received the goods from the plaintiff they had placed an endorsement 'Good received contents not check' on each and every delivery orders and have also been careful in the choice of words in their letter dated 26 July 2006 by using the word 'purported', then surely, the defendant could have been more prudent by deleting the

endorsement of the interest payment at 1.5% per month on the delivery orders and invoices and return the same to the plaintiff which they claimed to have been done in the credit application form if in fact the defendant was seriously contesting the interest payment of 1.5% per month on all over due payments. However, it is regretful to note that the defendant did nothing over the period of their business transaction or dealings with the plaintiff but as an afterthought and as a desperate attempt is trying to avoid the payment by urging upon this court to consider the undated credit application form and to treat the same as if the plaintiff had agreed to their proposed term to waive interest where the said form is not only undated but not even signed by the plaintiff to indicate any consent or agreement.

[18] The most interesting thing to note in the statement of defence and the affidavit in reply of the defendant is that, the defendant has the audacity to say that they did not bother and ignored the said endorsement for interest payment set out in the delivery orders and the invoices because they took a unilateral stand that the same was arbitrary and not binding on the defendant as it was not in keeping with the term set out in the credit application form. Surely the defendant should have protested to the endorsement as and when the delivery orders and invoices were received by them if they were serious and genuinely had disputed the claim for the interest payment and informed the plaintiff of their protest but nothing was done.

[19] It is not enough for the defendant in answer to the plaintiff's application to sign final judgment, to raise an issue, or any issue. They must, however, raise such issue as would require a trial in order to determine it. In other words, the issue raised must be an arguable issue. But where the issue raised is irrelevant and ineffective, or to use the words of Lord Greene MR in *Cow v Casey* [1949] 1 KB 474, 'when the point is understood and the court is satisfied that it is really unarguable', the plaintiff should be entitled to what they had prayed for in the application (see *Voo Min En & Ors v Leong Chung Fatt* [1982] 2 MLJ 241).

In *Woon Hoe Kan & Sons Sdn Bhd v Bandar Raya Developments Bhd* [1974] 1 MLJ 24, HT Ong CJ at p 25 said:

> In my view there was clearly evidence of the appellants' forbearance to sue upon the certificates for a considerable time — such forbearance being in consideration of 'an agreement to pay interest on overdue payments'.
>
> The debit notes claiming interest at such stated rate were never challenged or disputed.

In *Tansa Enterprise Sdn Bhd v Temenang Enginerring Sdn Bhd* [1994] 2 MLJ 353, Haidar J (as he then was) at p 365 said:

In respect of the claim of interest of 1.5% per month for overdue accounts by the plaintiff the defendant cannot deny this claim as it has full knowledge of this as clearly indicated in the invoices submitted to it by the plaintiff and there was no protest of this claim at all when the invoices were presented to the defendant. I am therefore of the view that the plaintiff is entitled to claim such interest it is similarly not a triable issue at all.

In *Daya Anika Sdn Bhd v Kuan Ah Hock* [1998] 6 MLJ 537, Kamalanathan Ratnam J said:

The plaintiff claimed for late payment interest of 1.5% per month amounting to RM224,191.42 as at 31 May 1997, based on a note on the invoices and delivery orders. The note stated that 'An interest of 1 1/2% per month will be charged on all overdue accounts'. The plaintiff relied on *Tansa Enterprise Sdn Bhd v Temenang Engineering Sdn Bhd* [1994] 2 MLJ 353; [1994] 1 LNS 160. At p 365 (MLJ), the learned judge held as follows:

> In respect of the claim of interest of 1.5% per month for overdue accounts by the plaintiff, the defendant cannot deny this claim as it had full knowledge of this as clearly indicated in the invoices submitted to it by the plaintiff and there was no protest of this claim at all when the invoices were presented to the defendant. I am therefore of the view that the plaintiff is entitled to claim such interest. It is similarly not a triable issue at all.

Another case relied on by the plaintiff is *Woon Hoe Kan & Sons Sdn Bhd v Bandar Raya Development Bhd* [1974] 1 MLJ 24; [1973] 1 LNS 176 where the Federal Court held that where there was evidence that the parties had agreed on the rate of interest, the order made by the court should be for payment at the agreed rate. The debit notes claiming interest at such rates were never challenged or disputed and therefore ought to be allowed. The defendant, on the other hand, did not submit any authorities except to deny that late payment interest is due. Therefore, I also hold that this is not a triable issue and give judgment for interest at 1.5% per month on the undisputed sum of RM1,014,132.15.

In *KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 MLJ 233; [1996] 2 CLJ 611, His Lordship Gopal Sri Ram for the Court of Appeal said:

It is not in dispute that between February 1990 and September 1991, the respondent sent statements of account to the appellant. These reflected the sales which the appellant had made and the monies that had been received by the appellant. At the material time, these accounts showed the appellant to be indebted to the respondent in the sum of RM175,024.41.

The respondent waited for payment, but none came. It consulted solicitors who wrote to the appellant a letter before action, dated 22 December 1992, demanding payment of the aforesaid sum.

Upon receiving this demand the appellant too consulted solicitors. They replied on 4 January 1993, denying any knowledge on the part of their client of the claim and requesting copies of several documents, including the agreement of sub-agency and a statement of account.

The way in which the appellant pleaded its case reveals a singular inconsistency of approach. By no stretch of the imagination could it be said that a sub-agency agreement which, according to the defence, never existed could be illegal. The way in which the defence has been cast left us with the distinct impression that it is an embarrassing pleading and delivered purely to delay the respondent from obtaining judgment in the action.

The learned judge who heard the respondent's summons for judgment found no triable issues. He accordingly entered judgment in favour of the respondent.

Another way of stating the proposition is that a party may, by his conduct in all the circumstances of a particular case, be estopped from asserting the absence of an agency relationship between him and he who claims to be his principal.

Viewed in this way, we perceive that the key to the whole case lies in the conduct of the appellant in this case. Encik Darshan Singh, in response to a question put to him by a member of the panel hearing this appeal, frankly conceded that his client did indeed receive the statements of account of which we have earlier spoken. It follows that a reasonable man similarly circumstanced as the appellant would, if it were really true that there had been no appointment of sub-agency as later claimed by it, have, post haste sent these accounts back to the respondent and denied any liability. But that is not what happened. The appellant remained silent, held onto the accounts, and did nothing about it. The denial by its solicitor's letter of 4 January 1993, came long after the delivery of the account. When asked why his client had kept silent for a rather long period of time, Encik Darshan Singh's response was that his client was a large company and did not do anything until the letter before action was received. We trust that we will be forgiven if we are unable to detect the logic in this response.

We are of the view that it would be a travesty of justice if we were to accede to the appellant's arguments. We are left in no doubt that the undisputed facts of this case admit of the conclusion that the respondent was, by the conduct of the appellant, lulled into the belief that the appellant had no challenge to the accounts, leave alone the legal relationship between the parties.

To put it another way, the appellant, by its silence coupled with the other circumstances of the case, encouraged the respondent to believe that it intended to raise no challenge to the existence of a prior legal relation between the parties or to the figure which the account showed as owing by it. Having done so, it ought not to be permitted to now contend otherwise.

It follows that it does not, therefore, lie in the mouth of the appellant to now deny the respondent's claim. It would be plainly inequitable to do so. An examination of the facts leads us to this conclusion. The legal basis upon which such a conclusion may be sustained is well-settled and is now beyond question. See *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331. (Emphasis added.)

[20] This court finds that if the defendant was serious that such an endorsement for interest payment at 1.5% per month in the delivery orders and the invoices were arbitrary and not binding, surely it would have required them to protest and inform the plaintiff of their objection as expeditious as

possible and as expected of a reasonable and prudent business entity and not just wait for a legal notice from the plaintiff's solicitor and legal advice to dispute the claim for interest payment. The conduct of the defendant is clearly inconsistent with the position they took previously during the time the delivery orders and invoices were received including their fax letter dated 8 March 2006 sent to the plaintiff and their subsequent conduct upon taking legal advice which is a round about turn and an afterthought as submitted by learned counsel for the plaintiff and no doubt is done with the view to delay the plaintiff's claim.

[21] The assertions as raised by the defendant is shown to be inconsistent with their conduct because of their inherent implausibility when compared with the contemporary documents and other compelling evidence which are self-contradictory with the defendant's own evidence as found by this court and as stated above (see *Bhogal v Punjab National Bank, Basha v Punjab National Bank* [1988] 2 All ER 296 at p 303). In considering the whole situation, this court is unable to say there is a fair or reasonable probability of the defendant having a real or bona fide defence which requires any investigation in a trial or oral examination.

> If allegations are made in affidavits by the plaintiff and those allegations are credibly denied by the defendant's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the plaintiff's claim by consideration of the undisputed facts (see *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 at p 436).

[22] Based on the totality of the evidence produced by both parties, this court is satisfied that the issue raised by the defendant is not a triable issue but a merely an issue raised as an afterthought to delay the plaintiff's claim for summary judgment and the plaintiff's entitlement for the interest payment as claimed. The defendant cannot raise an issue and contend that it is a triable issue in the face of their admission for failure to protest at the first available opportunity against the claim for interest payment as endorsed in the delivery orders and invoices when it was received by them, or at least in their letter dated 8 March 2004. This court finds that there is a lack of bona fide on the part of the defendant when they took the issue at a late stage and disputed the claim for the interest payment. On affidavit, it is not a case where it is impossible for this court to say that the plaintiff is entitled to judgment. Therefore, it is inexpedient to allow the defendant to defend for the mere purpose of delay (see *Jones v Stone* [1894] AC 122). 'When a judge is satisfied not only there is no defence, but no fairly arguable point to be argued on behalf of the defendant, it is his duty to give judgment for the plaintiff' (per Jessell MR in *Anglo Hawaiian Bank v Wells* 38 LT 201).

[23] This court is unable to agree with the contention of learned counsel for the defendant that there is a triable issue to proceed to trial. On the facts and circumstances in the instant case, which includes the various documents attached to the affidavits of both parties and marked as exhibits, this court finds that the defence or issue raised by the defendant is clearly unsustainable in law or on the facts, thus averting the need for a full trial thereby saving time and costs. This court is satisfied that there is no triable issue in the instant case and neither are there any other reasons for a trial. Further, the plaintiff has succeeded in producing sufficient evidence to eliminate the need for a trial under both the limbs and have satisfied all the requirement and procedure for a summary judgment (see majority judgment in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2007] 1 AMR 825). (See *Ng Ah Ba & Ors v Ramanda Sdn Bhd* [1996] 1 MLJ 62 at p 78; [1995] 3 AMR 2949 at p 2965). Therefore, the appeal ought to be and is dismissed with costs. The decision of the learned sessions court judge which was given on 25 March 2008 is affirmed.

Appeal dismissed with costs.

Reported by Kohila Nesan